

No. 83-1635

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**IN THE
Supreme Court of the United States
October Term 1983**

JEROME S. WAGSHAL,

Petitioner,

v.

**CROZER-CHESTER MEDICAL CENTER and
UNIVERSITY OF SOUTHERN CALIFORNIA**

Respondents.

**RESPONSE OF CROZER-CHESTER MEDICAL
CENTER TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA**

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Respondent Crozer-Chester Medical Center (hereinafter "Respondent CCMC") submits this response to the Petition for a Writ of Certiorari filed by Jerome S. Wagshal (hereinafter "Petitioner"). The Respondent submits that the Petition does not present any basis to support grant of a writ of certiorari in this case. That petition fails to satisfy

the standards set forth in Rule 17, Rules of this Court, for a grant of review on writ of certiorari.¹

STATEMENT OF THE CASE

This matter involves an action brought by Petitioner Wagshal for the award of attorney fees for services provided in a plaintiff class action suit which sought the release of wrongfully impounded federal medical research and training grant funds. The success of that class action resulted in the release of a large amount of funds which had been illegally withheld.

That action was brought as a class action against Secretary Weinberger with the lead plaintiff designated as the National Association for Mental Health ("NAMH") and with the Respondents being named as plaintiff class members. NAMH entered into a retainer arrangement with

¹Rule 17 sets forth the considerations governing review on certiorari as the following:

- a. When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
- b. When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
- c. When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

petitioner to represent the plaintiff class at an hourly fee of \$35. NAMH and Petitioner also agreed that Petitioner would request the District Court for an award of attorney fees if the suit was successful in gaining release of the impounded funds. Petitioner's App., 6a. Pursuant to the terms of that retainer agreement, Petitioner received a payment of over \$27,000 from NAMH. Petitioner was also paid retainer fees in two related cases of over \$34,000 and received a settlement fee in one of those cases of another \$84,000. Petitioner's App., 6a.

Following a decision on the merits, Petitioner applied to the District Court for a fee award either from unexpended grant funds or from the successful grant recipients and potential recipients. An award of attorney fees by the district court of over \$80,000 to be made from the unexpended funds was overturned on appeal, upon a finding that the grant funds could not be used for that purpose. *National Association for Mental Health, Inc. v. Weinberger*, 68 F.R.D. 387 (D.D.C. 1975), *rev'd mem sub. nom National Association for Mental Health, Inc. v. Califano*, 561 F.2d 1021 (D.C. Cir. 1977).

Petitioner then brought two separate proceedings in his effort to gain an attorney fees award. Petitioner filed a renewed application in the original suit seeking a fee award to be paid directly by the plaintiff class members in the original impoundment suit. *National Association for Mental Health, Inc. v. Califano*, C.A. 1812-73 (D.D.C.). That application was denied on August 25, 1981 as the district court found that certification of a plaintiff class for one purpose did not replace the need for *in personam* jurisdiction over the class members in order to secure a judgment against them for attorney fees. Petitioner's App., 27a.

Petitioner also brought a class action against members of the plaintiff class in the impoundment suit naming the present Respondents as members of the potential defendant class in this attorney fees case. *Wagshal v. Crozer-Chester Medical Center et al.* C.A. 77-215 (D.D.C.). The district court denied a motion to certify a defendant class on the grounds that the Respondents would not fairly protect the members of the class. The district court also found that it did not have *in personam* jurisdiction over the members of the proposed defendant class. Petitioner's App., 23a. Petitioner's action against the Respondents, as the two named parties in the action against the defendant class, was then dismissed upon a jurisdictional finding that the amount in controversy as to the named defendants did not exceed \$10,000. Petitioner's App. 22a.

Petitioner appealed the action of the district court dismissing his action against the two Respondents and the proposed defendant class. On appeal, the decision of the district court was affirmed. In its decision, the appellate court took specific note of the directive it had previously issued for "counsel to make prelitigation arrangements for payment of fees, curbing *any* possibility that grant recipients should not be subjected to *in personam* jurisdiction or forced to defend their interests by retention of counsel," Petitioner's App., 13a. The district court requirement of *in personam* jurisdiction was upheld by the appeals court with the conclusion that, "[t]o hold otherwise would be to demand of members of a class of years-ago ended litigation that they now appear and defend against charges that they owe substantial sums of money to a lawyer they had never known, much less hired." Petitioner's App., 14a. The appellate court also affirmed the lower court's refusal to designate either Respondent as a representative of a defendant class as a legitimate exercise of the district court's discretion. Petitioner's App., 17a.

In conclusion, the appellate court stated:

[I]t is within the attorneys' power, at the *start* of a case, to settle the terms under which the litigation will be pursued. The courts are not empowered to enforce that which was never agreed to among the parties. Mr. Wagshal failed at the beginning of his efforts to attend to arrangements regarding his fees. We cannot alter that fact.

Petitioner's App. 20a.

SUMMARY OF THE ARGUMENT

While Respondent CCMC understands the frustration of the Petitioner in his quest for an attorney fees award, Respondent CCMC must oppose the Petition for it fails to present the special and important reasons which this Court has determined merit further review. As recognized by the appellate court, this case presents the attempt by an attorney to find some legal means by which he can recoup attorney fees which should have been determined by appropriate arrangements before the case began.

Petitioner fails to properly support his claim that the lower courts' dismissal of its application due to the absence of *in personam* jurisdiction over the potential defendant class members should be reviewed by the court. Unlike the cases cited by the Petitioner, the original impoundment case giving rise indirectly to this Petition did not produce a common fund from which an award of attorney fees could be made. Neither did that case involve a defendant against which such an award could be made. The decisions of this Court cited by Petitioner in no way conflict with the findings of the lower court in this case, that a court must have *in personam* jurisdiction over

defendants where attorney fees are sought *directly* from those defendants.

Petitioner also does not satisfy this Court's standard for review by his claim that the lower courts erred in refusing to certify a defendant class because the Respondents CCMC and the University of Southern California would not be proper representative parties of that class. That determination rests with the discretion of the district court. Given the minimal amount at stake for either Respondent and the representation of each Respondent that it would not defend *its own* interests much less that of the potential class members, the district court properly exercised its discretion in denying Petitioner's motion for class certification. That reasoned decision of the district court does not provide any basis to support grant of the Petition for Writ of Certiorari.

ARGUMENT

The Petitioner's basic argument is revealed in the Petition's Conclusion which states:

The court of appeals noted, unsympathetically, Petitioner's "theme that the court must have some way of getting to him his just due." *Id.* Petitioner continues to believe in this ideal and bases this petition on it.

Petition, 21.

The Petitioner, in essence, is requesting this Court to provide him some mechanism to obtain attorney fees to rectify his failure to make appropriate arrangements prior to pursuing his litigation efforts. Respondent CCMC submits that Petitioner's general equitable claim is an insufficient basis to warrant this Court's jurisdiction. Neither do

the two specific claims of error presented by the Petitioner merit this Court's review.

I. Jurisdiction of this Court Cannot be Premised Upon the Lower Courts' Denial of the Petitioner's Application Due to Absence of Personal Jurisdiction.

Petitioner urges this Court to review the lower courts' determination that attorney fees could not be awarded in the absence of *in personam* jurisdiction over the potential defendant class members. The findings of the lower courts, which the Petitioner claims to be in error, solely pertain to a class action seeking the release of federal funds which were wrongfully impounded. As such, Petitioner fails to identify any direct conflict between these decisions and others rendered by federal circuit courts of appeal. Petitioner also fails to demonstrate that the issue presented in this case involves an important question of federal law or that the lower courts have decided a federal question in a way which conflicts with the applicable decisions of this Court. Instead, the Petitioner simply claims that the lower courts' decisions are in conflict with *principles* adopted by this Court in a number of prior decisions.²

The holdings of the lower courts in this case are not inconsistent with the principal decision of this Court cited in the Petition. That decision dealt with the jurisdictional question involved in an award payable from a judgment fund. In the principal case cited by Petitioner, *Van Gemert v. Boeing Co.*, 444 U.S. 472, this Court specified:

²*Van Gemert v. Boeing Co.*, 444 U.S. 472; *Trustees v. Greenough*, 105 U.S. 527; *Central Railroad and Banking Co. v. Pettus*, 113 U.S. 116; *Sprague v. Ticonic National Bank*, 307 U.S. 161; *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240.

. . . this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.

Id. at 478.

The *Van Gemert* decision made clear that its holding was premised upon a court's jurisdiction over the common fund itself. 444 U.S. at 478. Where no specific fund was created, this Court has recognized that the court's jurisdiction over a corporation as the nominal defendant enables an award of fees against members of a class through an award against the corporation. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 394 (1970). The basis of the jurisdictional holdings or dicta presented in these cases are distinguishable from the present case. In this case, there is no judgment fund from which an award of attorney fees could be made. Neither did the original impoundment case involve a defendant over which the lower court could assert jurisdiction to entertain an action for attorney fees. The lower courts properly found in this case that any payment of attorney fees from the federal grant funds would be an award against the United States contrary to 28 U.S.C. §2412 (1970). Petitioner's App., 8a. The issue here as presented by Petitioner is not in conflict with any of the cases cited and fails to meet the applicable jurisdictional standard of this Court.

II. Jurisdiction of this Court Cannot Be Based Upon Petitioner's Claim of Error in the Lower Courts' Denial of Class Certification.

Petitioner urges this Court to review the lower courts' rejection of his motion for defense class certification. Petitioner notes that "... this Court has not spoken on the issues of class litigation involving a defendant class as distinguished from a plaintiff class," Petition, 17, and asserts that "this is an ideal setting to consider the standards for certification of such a class," Petition, 19. Petitioner's suggestion that it is timely for this Court to address a specific issue is not a basis warranting review by this Court.

As recognized by the appellate court, certification of a class rests with the discretion of the lower court based upon the lower court's consideration of the four factors set forth in Rule 23 of the Federal Rules of Civil Procedure. Petition App., 17a. The lower courts' finding that Respondents CCMC and the University of Southern California would not be proper representative parties in vigorously defending the interests of the unnamed class members was properly founded on the particular facts of the case. As the appellate court noted, the maximum exposure of CCMC here is only \$250 and that of the University of Southern California is less than \$1000. Faced with that minimal level of liability, both Respondents represented to the lower court that they would not vigorously defend *their* own interest in the case, much less than that of the class members. With this factual background, Petitioner's representation that this case presents an ideal setting to consider standards for certification in a defendant class action is unpersuasive.

CONCLUSION

As the appellate court concluded, this case presents an individual instance of an attorney's failure to attend to the necessary arrangements regarding his fees at the *start* of the case. Petition, App. 20a. The Petitioner has failed to meet the standards of this Court meriting further review. Respondent CCMC respectfully urges this Court to deny the Petition.

Respectfully submitted,

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June 19, 1984

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response of Crozer-Chester Medical Center to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia was forwarded to the following this 20th day of June, 1984:

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